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The ECtHR's Grand Chamber Judgment in Ilias and Ahmed Versus Hungary: A Practical and Realistic Approach

Can This Paradigm Shift Lead the Reform of the Common European Asylum System?

Ágnes Töttős[*]

Abstract

The judgment of the Grand Chamber of the ECtHR in Ilias and Ahmed v. Hungary reflected a big turn of the ECtHR towards a practical and realistic approach. Although the Grand Chamber found that Hungary by choosing to use inadmissibility grounds and expel the applicants to Serbia failed to carry out a thorough assessment of the Serbian asylum system, including the risk of summary removal, contrary to the Chamber it found that a confinement of 23 days in 2015 did not constitute a de facto deprivation of liberty. This paradigm shift is already visible in further decisions of the Court, and it could even serve as a basis for a new direction when reforming the Common European Asylum System.

Keywords: ECHR, Hungarian transit zone, deprivation of liberty, concept of safe third country, Common European Asylum System.

1. The Facts of the Case

The *Ilias and Ahmed v. Hungary*[1] case concerned two Bangladeshi nationals who transited through Greece, the Former Yugoslav Republic of Macedonia and Serbia before reaching Hungary, where they entered the transit zone in Röszke and immediately applied for asylum. They were held in a transit zone for 23 days. The admittance of the applicants into the Hungarian transit zone coincided with the introduction of a new asylum regime in Hungary.[2]

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1 *Ilias and Ahmed v. Hungary (GC)*, No. 47287/15, 21 November 2019 *(Ilias and Ahmed GC judgment)*.

2 Act CXL of 2015 on amending certain laws relating to the management of mass immigration, which entered into force on 15 September 2015.

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On 15 September 2015 the Hungarian Government declared a state of crisis due to mass migration in the counties of Bács-Kiskun and Csongrád[3] followed by the construction of a temporary border security fence, statutory amendments, and the reinforcement of border protection, the purpose of which was to minimize illegal migration. As a result, migrants arriving from Serbia could only submit their asylum applications at two transit zones in Röszke and Tompa, where their asylum applications were registered. Applications were assessed in the border asylum procedure by the authorities within a maximum of eight days, and an applicant could request a court review of the decision, but no later than two days after a decision had been issued. In the event of refusal, migrants were sent back to Serbia, however, the Hungarian Government did not regard this as deportation, as applicants were not on Hungarian territory when they were within the transit zone. According to the Hungarian Government migrants in the transit zone were not in custody as they were free to leave towards Serbia at any time.[4] Unaccompanied minors and people with special needs were not placed in the transit zones, and their cases were decided according to the normal procedure. Asylum-seekers, whose procedure exceeded 28 days were also let into Hungary in line with Article 43(2) of the Asylum Procedures Directive.[5]

As regards the background of the applicants, the applicants were born in Bangladesh in 1983 and 1980. The first applicant found himself alone in Pakistan at the age of eight, and suffered abuse, including by the police, then in his twenties he returned to Bangladesh, living homeless, abused by the police and receiving threats from a political party. Later he was expelled by the police to India, then he spent short periods of time in Pakistan, Iran and Turkey, and then paid smugglers to bring him to Greece, where he spent two and a half months. The second applicant lived in Bangladesh until he left in 2010 because floods had destroyed his home and killed his family. He went to India, Pakistan and then to Dubai, where a smuggler made him work for two years and then transferred him to Iran, Turkey and finally to Greece, where he worked for two years. The two applicants met in Greece and they left together for North Macedonia, Serbia and Hungary. The first applicant never went to school, the second applicant finished only the first three years of school.[6]

Hungary was the first country where both applicants had applied for asylum. During the asylum interview by the Hungarian asylum authority one of the applicants was provided interpretation and legal information in Dari, a language which he did not speak.[7] During the interview, the first applicant was informed

3 *See* at www.kormany.hu/en/prime-minister-s-office/news/government-declares-state-of-crisis-due-to-mass-migration-in-two-counties.

4 *Ilias and Ahmed GC judgment,* para. 201.

5 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

6 Certain elements of the applicants' background were not present in the allegations made to the Hungarian authorities or were only made in the second sets of the domestic judicial proceedings or were presented with variations.

7 *Ilias and Ahmed v. Hungary,* No. 47287/15, 14 March 2017 *(Ilias and Ahmed Chamber judgment)*, para. 13.

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that he had three days to provide reasons for his decision not to request protection in Serbia, while the second applicant was also invited to do the same, albeit as an immediate obligation.[8] The applicants' asylum requests submitted on 15 September 2015 were rejected the same day as inadmissible based on a 2015 Government Decree[9] listing Serbia as a safe third country and on the grounds that the applicants had not rebutted that presumption as they had not even considered the possibility of submitting an asylum claim in Serbia. Hence, the applicants' expulsion was ordered.

Following a successful appeal the Szeged Administrative and Labor Court annulled the asylum authority's decisions and remitted the case to it for fresh consideration, arguing that the asylum authority should have analyzed the actual situation in Serbia regarding asylum procedure more thoroughly and should also have afforded the applicants three days to rebut the presumption of Serbia being a safe third country with the assistance of legal counsel. In the renewed procedure before the asylum authority, the applicants submitted a written opinion by a psychiatrist, who declared that they both have post-traumatic stress disorder. On 30 September 2015, the asylum authority rejected the asylum applications again as it found that the psychiatrist reports had not provided enough grounds to grant the applicants special treatment. As to the status of Serbia being classified as a safe third country, the asylum authority had regard to relevant reports by the UNHCR and an NGO. It further noted that the applicants had not referred to any pressing individual circumstances substantiating the assertion that Serbia was not a safe third country in their case, so they had been unable to rebut the presumption.[10]

The applicants once again sought judicial review by the Szeged Administrative and Labor Court, but the court was satisfied that the asylum authority had established the facts properly and observed the procedural rules, and that the reasons for its decision were clearly stated and were reasonable. The court further emphasized that the statements given by the applicants at the hearings had been contradictory and incoherent. Since the court upheld the asylum authority's rejection on 8 October 2015, the applicants were escorted out of the transit zone the same day without physical coercion being applied. They crossed the border back into Serbia.[11]

Relying on Article 5(1) (right to liberty and security) and Article 5(4) (right to have the lawfulness of detention decided speedily by a court) ECHR, the applicants alleged that the 23 days they spent in the transit zone amounted to a deprivation of liberty which had no legal basis and which could not be remedied by an appropriate judicial review. Further relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy)

8 *Ilias and Ahmed GC judgment,* para. 22.

9 Government Decree 191/2015. (VII. 21.) on National designation of safe countries of origin and safe third countries.

10 *Ilias and Ahmed GC judgment,* para. 36.

11 This was not carried out in the framework of an official readmission procedure, in application of the 2007 EU-Serbia readmission agreement and its implementing protocol concluded between Hungary and Serbia promulgated by Government Decree No. 53/2010. (III. 11.).

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ECHR, they alleged that their protracted confinement in the transit zone under substandard conditions, especially given that they were suffering from post-traumatic stress disorder, was inhuman. Further relying on Article 3, they alleged that their expulsion to Serbia, without a thorough and individualized assessment of their cases, exposed them to possible chain-*refoulement via* Serbia and North Macedonia to Greece, where they were at risk of inhuman reception conditions. They further claimed that the inadequacy of the asylum proceedings was aggravated by the procedural mistakes the authorities made. Under Article 13 (right to an effective remedy) in conjunction with Article 3, they also complained of alleged deficiencies in the examination of their legal challenge to their expulsion.

The ECtHR (Fourth Section) delivered its judgment on 14 March 2017 finding that the procedure applied by the Hungarian authorities in considering Serbia a safe third country was not appropriate to provide the necessary protection against a real risk of inhuman and degrading treatment and that the applicants' confinement for more than three weeks in the Röszke transit zone amounted to a *de facto* deprivation of their liberty that they could not contest. On 18 September 2017, the Grand Chamber Panel accepted the Hungarian Government's request that the case be referred to the Grand Chamber. The ECtHR held a Grand Chamber hearing on 18 April 2018 in the case. The Grand Chamber adopted its judgment on 21 November 2019 in which it changed the conclusion as regards the legal nature of the Hungarian transit zone and found that the confinement of the two applicants for 23 days did not reach the level of *de facto* deprivation of liberty. As a result, the Court decreased the sum of 10,000 EUR per person award for their non-pecuniary damage to 5,000 EUR.

2. The Judgments of the ECtHR

2.1. The Chamber Judgment

2.1.1. The Legal Assessment of the Nature of the Hungarian Transit Zone

First of all, the applicants complained that their committal to the transit zone amounted to deprivation of liberty without a legal basis, in breach of Article 5(1) ECHR. While examining the admissibility of the complaint the Court assessed the legal situation of the Hungarian transit zone, namely the question whether the placing of the applicants there constituted a deprivation of liberty within the meaning of Article 5 ECHR. Such an assessment was necessary as in line with the case-law of the Court the difference between deprivation of and restriction upon liberty is irrespective of the domestic legal qualification of the placement. Furthermore, such a difference is not of nature or substance either, but of degree or intensity.[12] The Court acknowledged that holding aliens in an international zone involves a restriction upon liberty, which can be different from detention, yet

12 *Ilias and Ahmed Chamber judgment,* para. 53.

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> "Such confinement is acceptable only if it is accompanied by safeguards for the persons concerned and is not prolonged excessively. Otherwise a mere restriction on liberty is turned into a deprivation of liberty."[13]

The Hungarian Government highlighted that the applicants had been free to leave the territory of the transit zone in the direction of Serbia at any point of the procedure. The applicants contested that such a departure from the transit zone would have resulted in the forfeiture of their asylum application. The Court identified both objective and subjective elements, which need to be taken into account when examining the specific situation of the applicants and assessing the degree and intensity of the confinement.[14] The objective elements include the type, duration, effects and manner of implementation of the measure in question, the possibility to leave the restricted area, the degree of supervision and control over the person's movements and the extent of isolation. A subjective element is whether the person validly consented to the confinement in question.

When assessing the applicants' situation, the Court failed to follow the listed criteria and did not provide a detailed assessment of all the objective and subjective factors. Instead, the only objective factors recited by the judgment were the facts that the applicants were confined for over three weeks and the placement in the transit zone strongly resembles an international zone as it was a guarded compound.[15] The Court also missed the opportunity to examine the unique nature of the Hungarian land border transit zone as opposed to airport transit zones and only superficially touched upon this question when declaring that among the airport transit zone cases this complaint resembles those[16] where the applicants did not have the opportunity to enter the territory of the State. Contrary to the objective element, the Court put much attention to the subjective factor and considered that the applicants did not voluntarily choose to stay in the transit zone, they simply stayed because it would have resulted in unwanted and grave consequences as regards their asylum claims. The Court concluded that the applicants' confinement to the Hungarian transit zone amounted to a *de facto* deprivation of liberty.[17]

Once the Court found the transit zone to be a *de facto* deprivation of liberty, it examined whether it was in merit compatible with Article 5(1) ECHR. Based on its case-law the Court lists a number of positive and negative conditions that need to be met in order to avoid detention being branded as arbitrary. In order for this

> "Detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorized entry of the person to the country; the place and conditions of detention should be

13 Id. para. 52.
14 Id. para. 53.
15 Id. para. 54.
16 *See e.g. Amuur v. France*, No. 19776/92, 25 June 1996.
17 *Ilias and Ahmed Chamber judgment,* para. 56.

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> appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued."[18]

An additional negative condition is that EU Member States should not hold a person in detention for the sole reason that he or she is an applicant in accordance with the EU Asylum Procedures Directive. The Court reiterated that when deciding on the lawfulness of detention, Article 5(1) ECHR refers not only to national law but also, where appropriate, to other applicable legal norms, which may also stem from EU law.

As for the assessment of the possible arbitrary nature of the deprivation, the Court stated that although the motive, namely to counter abuse of the asylum procedure could have been justified, the Hungarian national legislation set out no grounds for detention in the transit zone. Furthermore, it was a mere practical measure as it was not considered legally a detention and therefore the placement in detention was not enshrined in a formal decision. Consequently, the Court held, unanimously, that there had been a violation of Article 5(1) ECHR, finding that the applicants' detention cannot be considered lawful.[19] Moreover, the Court also concluded that the applicants did not have at their disposal any proceedings by which the lawfulness of their detention could have been decided speedily by a court, and therefore, there had been a violation of Article 5(4) ECHR, as well.[20]

2.1.2. Conditions in the Hungarian Transit Zone

The Chamber then dealt with the alleged violation of Article 3 ECHR based on the conditions at the Röszke border transit zone. In this regard the Court reminded the parties that it has recently summarized the general principles[21] applicable to the treatment of migrants in detention in the judgment of *Khlaifia and others v. Italy*.[22] Consequently, the Court took into account the extremely difficult asylum situation that had contributed to the difficulties and inconveniences endured by the applicants. Nevertheless, it also stated that an increasing influx cannot absolve a State of its obligation under Article 3 ECHR.

When considering the conditions in the transit zone, it appeared that many of the applicants' claims (no access to legal, social or medical assistance, television or internet, telephone or recreational facilities) were described completely differently by international organizations that stated that there was no indication that the material conditions were poor. As regards the posttraumatic stress that the applicants suffered from, the Court noted that the alleged events in Bangladesh due to which the applicants are vulnerable had occurred years before

18 Id. para. 64.
19 Id. para. 69.
20 Id. paras. 76-77.
21 The detention of migrants did not meet the general principle of legal certainty or protect the applicants from arbitrary treatment.
22 Id. para. 83. *See Khlaifia and others v. Italy (GC)*, No. 16483/12, 15 December 2016, paras. 158-167.

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the applicants' arrival in Hungary and that the applicants in the present case were not more vulnerable than any other adult asylum-seekers in the transit zone and therefore should not have had to be considered so vulnerable as not to apply the border procedure in their case.[23]

All in all, in view of the satisfactory material conditions and the relatively short time involved the Court concluded that the conditions and treatment in the transit zone did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 ECHR.[24] Nevertheless, the Chamber stated that there had been a violation of Article 13 (right to an effective remedy) due to the lack of an effective remedy to complain about the conditions of detention, as the remedy within the meaning of Article 13 must be effective in practice as well as in law.[25]

2.1.3. The Assessment of the Concept of Safe Third Country and the Principle of Non-Refoulement[26]

Lastly, the Chamber had to examine whether the applicants' expulsion to Serbia had exposed them to a real risk of chain-*refoulement* (that is the risk of being refouled to Serbia, then to further transit states, such as Greece, and finally even to the country of origin), which amounted to inhuman and degrading treatment in breach of Article 3 ECHR. States have the right to control the entry, residence and expulsion of aliens, nevertheless these rights shall be exercised in line with obligations deriving from international law or other applicable obligations. As a result, when ordering the expulsion of an alien States have the obligation to examine that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country.[27]

A major question of the safe third country assessment is the division of the burden of proof and the intensity of the proof and assessment required in order to accept an obligation as having been fulfilled. In this regard the Court provides the following guidance:

> "It is in principle for the person seeking international protection in a Contracting State to submit, as soon as possible, his claim for asylum with the reasons in support of it, and to adduce evidence capable of proving that there are substantial grounds for believing that deportation to his or her home country would entail a real and concrete risk of treatment in breach of Article 3. However, in relation to asylum claims based on a well-known general risk, when information about such a risk is freely ascertainable from a wide number of sources, the obligations incumbent on States under Article 3

23 *Ilias and Ahmed Chamber judgment,* para. 87.
24 Id. para. 89.
25 Id. para. 98.
26 Articles 2, 3, 8 and 13, The Concept of a 'Safe Third Country' in the Case-Law of the Court, Council of Europe/European Court of Human Rights, 2018, at www.echr.coe.int/Documents/Research_report_safe_third_country_ENG.pdf.
27 *Ilias and Ahmed Chamber judgment,* para. 112.

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> of the Convention in expulsion cases entail that the authorities carry out an assessment of that risk of their own motion."[28]

Based on the guidance above, the Court disapproved of the fact that the Hungarian authorities did not carry out an individualized assessment, but instead relied on a presumption in this respect set out by a Government Decree listing Serbia as a safe third country. Hungary argued to no avail that EU Member States are free to set out such national lists in accordance with the criteria set forth by Directive 2013/32/EU, and that Serbia was on the Hungarian list because it was a party to the Geneva Refugee Convention and an EU candidate country, furthermore, no case-law under the Convention indicated that Serbia was not a safe country. The Court found it inappropriate that such a presumption regarding the status of Serbia resulted in the reversal of the burden of proof to the applicants' detriment. The judgment even seemed to disapprove the Hungarian decision of making Serbia a part of the list on the safe third countries as according to the Court it produced an abrupt change in the Hungarian stance on the country, putting the motives of legislators regarding this decision into question.[29]

Nevertheless, in its judgment the Chamber revealed that it was not necessarily the possible treatment in Serbia, but the risk of chain-*refoulement* to an EU Member State, namely Greece that the Court was concerned about, the risk of which the Hungarian authorities should have ruled out.[30] As regards the issue of the burden of proof falling onto the applicants, the Court disregarded the statement of Hungary that the applicants had submitted incoherent and contradictory statements and as a result they had not been able to rebut the presumption, and instead blamed the authorities for failing to provide the applicants with sufficient information on the procedure.

Consequently, the Chamber held unanimously that there had been a violation of Article 3 on account of the applicants' expulsion to Serbia as they had not had the benefit of effective guarantees to protect them from exposure to a real risk of being subjected to inhuman or degrading treatment. The Chamber found in particular that, in the applicants' asylum proceedings, the Hungarian authorities had failed to carry out an individual assessment of each applicant's case; had schematically referred to the Government's list of safe third countries; disregarded the country reports and other evidence submitted by the applicants; and had imposed an unfair and excessive burden on them to prove that they were at real risk of a chain-*refoulement* situation, whereby they could eventually be driven to Greece to face inhuman and degrading reception conditions.

28 Id. para. 115.
29 Id. paras. 118-120.
30 Id. para. 122.

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2.2. The Judgment of the Grand Chamber

2.2.1. Expulsion to Serbia

As for the assessed complaints, the Grand Chamber chose exactly the opposite order of examination of questions as the Chamber. When defending the expulsion to Serbia, the Hungarian Government emphasized the distinction between the right to seek asylum, and a purported right to be admitted to a preferred country offering the best protection (right to asylum-shopping), and pointed at the severe consequences of allowing for such abuses:

> "The practical impossibility of removing undocumented migrants who were not entitled to international protection had rendered immigration uncontrollable. This was causing social tension, a feeling of powerlessness and a sense of loss of sovereignty in affected States. Asylum-shopping diverted resources from the search for collective solutions by the international community to the resettlement of refugees or improving their situation in the first safe country. In this respect, asylum-shopping was contrary to Article 17 of the Convention."[31]

The Hungarian Government also reacted to the critique of the Chamber on Hungary suddenly changing its view on Serbia and claimed that this legislative step was needed in the face of an unprecedented wave of migration aggravated by ever-increasing abuse.[32] Furthermore, Hungarian law only established a presumption, rebuttable in individual cases, and the relevant facts of general knowledge had been taken into account by the Hungarian authorities of their own motion, the applicants had merely been required to state how they had personally been affected by the alleged deficiencies.[33]

The Grand Chamber acknowledged the fact that the EU Asylum Procedures Directive provides for the possibility for national legislations to forego an examination of requests for international protection on the merits and to undertake an examination of admissibility instead. Nevertheless, the Court also emphasized that regardless of the *prima facie* non-genuine nature of an asylum application, no claim should be left unexamined in merits, as in such a situation it cannot be known whether the person to be expelled risks treatment contrary to Article 3 in their country of origin or are simply economic migrants.[34] Therefore, if an EU Member State declares an application inadmissible (instead of dismissing unfounded claims on the merits) and expels the applicant to an intermediary country,

> "The expelling State has to make sure that the intermediary country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being

31 *Ilias and Ahmed GC judgment,* para. 109.
32 Id. para. 112.
33 Id. para. 115.
34 Id. para. 137.

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> removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3 of the Convention."[35]

Consequently, when a state chooses the latter, namely the 'safe third country concept', a thorough up-to-date assessment by the national authorities is necessary, notably, of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice.

In its assessment the Court was mindful of the challenge faced by the Hungarian authorities in 2015, however, highlighting the absolute nature of the prohibition of ill-treatment the Court was not convinced that the Hungarian authorities thoroughly examined the available general information. Although they referred to certain reports and arguments, at the same time they failed to take into account report findings on significant risk of summary *refoulement* from Serbia to North Macedonia and Greece, which could result in the applicants being subjected to conditions incompatible with Article 3 in Greece.[36] In this regard, the Court did not consider it a sufficient argument that Hungary should not bear an additional burden to compensate for other states' deficient asylum system.[37] The Court also criticized Hungary for not alleviating the risk of summary removal by carrying out the expulsion through negotiations with the Serbian authorities, but instead simply made the applicants cross the border into Serbia without any effort to obtain guarantees, thereby exacerbating the risk of denial of access to the asylum procedure in Serbia.[38] Consequently, the Court found that Hungary had failed to comply with its procedural obligation to assess the risk of the applicants facing treatment contrary to Article 3 before removing them to Serbia, hence, violating that provision of the Convention.

2.2.2. Conditions in the Transit Zone

The Grand Chamber endorsed the Chamber's analysis regarding the physical conditions and the level of vulnerability of the applicants. The Court emphasized that the allegations of hardship and ill-treatment endured in Asia ended several years before, the applicants were confined for a relatively short time, and the applicants were aware of the procedural developments in the asylum procedure.[39] All in all, the Court found that the situation of the applicants did not reach the minimum level of severity necessary to constitute inhuman treatment within the meaning of Article 3 of the Convention. Apart from endorsing the Chamber's judgment in this regard the Grand Chamber found that the Hungarian Government's preliminary objection must be upheld concerning the complaint under Article 13 in conjunction with Article 3 because of the alleged lack of remedies in respect of the living conditions in the transit zone. As the complaint

35 Id. para. 133.
36 Id. paras. 158-160.
37 Id. para. 162.
38 Id. para. 161.
39 Id. paras. 191-193.

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was mentioned for the first time in the applicants' observations in the reply dated 29 August 2016, it was found inadmissible under Article 35(4) ECHR because of the expiry of the six-month time limit.

2.2.3. Restriction or Deprivation of Liberty

The key issue of whether there had been *de facto* deprivation of liberty, was left to be answered as the last main question of the Grand Chamber's judgment. In determining the distinction between a restriction on liberty of movement and deprivation of liberty the Court pointed to two sets of case-law in the context of confinement of foreigners as the bases of assessment: on the one hand, to confinement in airport transit zones, and on the other hand, confinement in reception centers for the identification and registration of migrants (hotspots) in Italy and Greece. Consequently, the Court identified the following factors to be taken into consideration and, compared to the Chamber, the Grand Chamber also devoted its time and energy to provide a detailed assessment based on these factors: *(i)* the applicants' individual situation and their choices; *(ii)* the applicable legal regime of the respective country and its purpose; *(iii)* the relevant duration, especially in light of the purpose and the procedural protection enjoyed by applicants pending the events; and *(iv)* the nature and degree of the actual restrictions imposed on, or experienced by the applicants.[40] The Court also observed that this was apparently the first time that it had had to deal with a case of a land border transit zone between two States who were members of the Council of Europe and where asylum-seekers had to stay during the examination of their asylum claims. It also added that the specific purpose, as well the physical and legal characteristics of such transit zones inevitably have an impact on the Court's analysis of the applicability of Article 5.[41]

As regards the applicants' individual situation and choices, the Court noted that the applicants had entered the transit zone on their own initiative in order to seek asylum in Hungary and had not faced an immediate threat to their life or health in Serbia which had forced them to leave that country. Considering the legal regime, the Court highlighted that the right of States to control the entry of foreigners into their territory necessarily implies that admission authorization may be conditional on compliance with relevant requirements, and the authorities only made the necessary verifications.[42] The Court also observed that

> "As long as the applicants' stay in the transit zone does not exceed significantly the time needed for the examination of an asylum request and there are no exceptional circumstances, the duration in itself should not affect the Court's analysis on the applicability of Article 5 in a decisive manner."[43]

40 Id. para. 217.
41 Id. para. 219.
42 Id. para. 225.
43 Id. para. 227.

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The Court took into account that the Hungarian authorities were working under conditions of mass influx of asylum-seekers, in which the transit zone's express purpose was to serve as a waiting area while asylum applications were processed and that individuals confined there benefitted from procedural rights and safeguards against excessive waiting periods, and therefore the Court considered that limiting the length of stay in the transit zone by Hungarian law had significant importance in this regard.[44]

As to the actual restrictions which the applicants had faced in the transit zone, the Court concluded that their freedom of movement had been restricted to a very significant degree given the small area of the zone, which was heavily guarded, however, it had not been restricted unnecessarily or for reasons unrelated to their asylum applications. The Court also examined the question whether the applicants had been able to leave the zone for any other country than Hungary. In this regard, the Court first noted that other people in similar situations had returned to Serbia from the transit zone, and at least some of them voluntarily. A further significant consideration was that, in contrast with people confined to an airport transit zone, people in a land border zone do not have to board an airplane to return to the country they had come from, as it was practically possible for the applicants to cross into Serbia, a country bound by the Geneva Refugee Convention; the possibility for the applicants to leave for that country had thus not only been theoretical, but realistic.[45] The Court also found a similar contrast with the situation of people confined on an island.[46]

As for the situation of Serbia, the Court distinguished the Serbian circumstances in respect of Articles 3 and 5 ECHR. Serbia was not considered a safe third country with regard to Article 3 because of the deficiencies in the functioning of its asylum system and the risk of summary removal to further countries. In contrast, with regard to Article 5 the Court found that no direct threat to the applicants' life or health existed in Serbia. The Grand Chamber explained that Article 3 imposes on the Contracting States stringent substantive and procedural duties, and if this also applied for the interpretation of the applicability of Article 5, it would stretch the concept of deprivation of liberty beyond its meaning intended by the Convention.[47]

> "In the Court's view, where – as in the present case – the sum of all other relevant factors did not point to a situation of *de facto* deprivation of liberty and it was possible for the asylum seekers, without a direct threat for their life or health, known by or brought to the attention of the authorities at the relevant time, to return to the third intermediary country they had come

44 Id. paras. 227-228.

45 The Court distinguished case *Amuur v. France* from the present case, as the applicants in *Amuur* had been confined to an airport transit zone which they had not been able to leave of their own volition and would have had to return to Syria, which was not bound by the Geneva Refugee Convention. By contrast, Serbia was bound by that Convention and the applicants had had the real possibility of being able to return there of their own will.

46 Id. para. 240.

47 Id. paras. 242-244.

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> from, Article 5 could not be seen as applicable to their situation in a land border transit zone where they awaited the examination of their asylum claims, on the ground that the authorities had not complied with their separate duties under Article 3. The Convention cannot be read as linking in such a manner the applicability of Article 5 to a separate issue concerning the authorities' compliance with Article 3."[48]

Nevertheless, this was the only point in which the Grand Chamber decided not unanimously, but by a majority, as Judges Bianku and Vučinić had a partly dissenting opinion.[49]

3. Comments

3.1. Summary and Novum of the Case

Apart from stating that the conditions in the Hungarian transit zone at Röszke did not amount to inhuman or degrading treatment, the case revolved around two main questions. Firstly, what consequences the expulsion to Serbia could mean and how during this procedure the assessment of safe third country concept was carried out and whether the principle of *non-refoulement* was properly followed and consequently, whether this resulted in a real risk of treatment contrary to Article 3 of the Convention. Second, whether a 23-day confinement to the transit zone amounted to *de facto* deprivation of liberty according to Article 5, or could only be considered a restriction of liberty.

Following the Chamber judgment in 2017 many scholars found that it represents a milestone in the protection of the rights of refugees[50] and expected that the Grand Chamber would reinforce the conclusions that in the case of *Ilias and Ahmed*, Hungary is in breach of both Articles 3 and 5 ECHR.[51] However, the Grand Chamber deviated from the findings of the Chamber judgment as regards

48 Id. para. 246.

49 In a partly dissenting opinion, Judge Bianku (joined by Judge Vučinić) elaborated on their disagreement with the finding of inadmissibility in respect of Article 5. The judges did not consider that an asylum seeker can be said to have a choice in the situation; as for the legal regime, they thought it "turns the clock back many years on the interpretation of Article 5" compared to the established case-law; regarding the nature and degree of the restrictions, the judges considered the distinction between applicants arriving at the land border, an airport or an island as artificial.

50 *See* Pavle Kilibarda, 'The ECtHR's Ilias and Ahmed v. Hungary and Why It Matters', *EJIL Talk!,* 20 March 2017, at www.ejiltalk.org/the-ecthrs-ilias-and-ahmed-v-hungary-and-why-it-matters/; Boldizsár Nagy, 'Restricting Access to Asylum and Contempt of Courts: Illiberals at Work in Hungary', *Blog on EU Immigration and Asylum Law and Policy,* 18 Sept 2017, at https://eumigrationlawblog.eu/restricting-access-to-asylum-and-contempt-of-courts-illiberals-at-work-in-hungary/.

51 *See e.g.* Attila Szabó & Anita Rozália Nagy-Nádasdi, 'Az Emberi Jogok Európai Bírósága migrációs őrizetre vonatkozó joggyakorlatának elemzése a magyar joggyakorlat tükrében', *Fundamentum*, 2017/1-2, p. 90; Erna Kristín Blöndal & Oddný Mjöll Arnardóttir, 'Non-Refoulement in Strasbourg: Making Sense of the Assessment of Individual Circumstances', *Oslo Law Review*, Vol. 5, Issue 3, 2018.

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the nature of confinement, since the Court found that the applicants' stay in the Röszke transit zone was not a *de facto* deprivation of liberty and so declared that Article 5 cannot be considered *ratione materiae* applicable to the case. The judgment was the first one to examine the situation in a land border transit zone. The considerations took into account the fact that the applicants' stay there involved a short waiting time, it was carried out in order for Hungary to verify their right to enter, they had entered on their own initiative and they were practically free to leave the area in the direction of Serbia.

Nevertheless, as for the situation of Serbia, the Court distinguished the Serbian circumstances in relation to Articles 3 and 5 ECHR, because on the one hand Article 3 imposes on the Contracting States stringent substantive and procedural duties, on the other hand, applying the same interpretation to the applicability of Article 5, would stretch the concept of deprivation of liberty beyond its meaning intended by the Convention. As a result, with regard to Article 3, the ECtHR did not consider Serbia a safe third country because of the deficiencies in the functioning of its asylum system and the risk of summary removal to further countries. The Court therefore declared that Hungary violated Article 3 by failing to conduct an efficient and adequate assessment when applying the safe third country clause to Serbia. It therefore follows that when State Parties do not examine an application for international protection in its merits based on a safe third country clause, Article 3 still requires that they apply a thorough and comprehensive legal procedure to assess the existence of such risk by looking into updated sources regarding the situation in the receiving third country.

3.2. The ECtHR's Paradigm Shift

A number of articles already examined the ECtHR jurisprudence from a critical point of view as regards it failure to scrutinize the necessity of immigration detention under Article 5(1)(f) ECHR.[52] It has been critically articulated that "the European Court of Human Rights has struggled to integrate the lived experience of migrants into the legal reasoning that underlies a determination of human rights violations",[53] and that the ECtHR treats migrants first as aliens and only as a second step in its reasoning, as human beings.[54] These voices have intensified as a result of the Grand Chamber judgment in *Ilias and Ahmed* delivered on 21 November 2019, claiming it has further eroded the protection extended to asylum-seekers under the Convention to the point that restrictions imposed upon asylum-seekers might not even be qualified as deprivation of liberty worthy

52 *See* Cathryn Costello, 'Immigration Detention: The Grounds Beneath Our Feet', *Current Legal Problems*, Volume 68, Issue 1, 2015, pp. 143-177.

53 Moritz Baumgärtel, 'Facing the Challenge of Migratory Vulnerability in the European Court of Human Rights', *Netherlands Quarterly of Human Rights*, Vol. 38, Issue 1, 2020, p. 12.

54 Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press, Oxford, 2015.

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of the protection of Article 5.[55] Even the judges, who had a partly dissenting opinion stated that the way the majority approached the applicable legal regime "turns the clock back many years on the interpretation of Article 5".[56]

Nevertheless, seeing this judgment and a post-*Ilias* decision of the Court through the lens of pragmatism, it might not point to erosion, but rather a more living approach to legal notions instead of handling them as artificial principles. It finally reacts to the critical views according to which Courts fail to take into account the will of policy makers and impose accurately measured additional obligations on States.[57] As regards the Chamber judgment, it was only the conditions in the transit zone where the Court aimed at considering the context, and not only the facts of the case.[58] By contrast, the Grand Chamber highlighted this approach also when examining the alleged violation of Article 5 of the Convention, as well.

The Court's recent judgment in *N.D. and N.T. v. Spain*[59] suggests that the 'practical and realistic'[60] approach applied in *Ilias and Ahmed* might not just be a one-time approach, but rather a shift of paradigm. The *N.D. and N.T. v. Spain* case concerned the immediate return to Morocco of two nationals of Mali and Côte d'Ivoire who in 2014 attempted to enter Spanish territory in an unauthorized manner by climbing the fences surrounding the Spanish enclave of Melilla on the North African coast. In its judgment of 13 February 2020, the Grand Chamber of the ECtHR held unanimously that there had been no violation of Article 4 of Protocol No. 4 (prohibition of collective expulsion) ECHR. The Court considered that the applicants had in fact placed themselves in an unlawful situation when they had deliberately attempted to enter Spain by crossing the Melilla border protection structures as part of a large group and at an unauthorized location, and had chosen not to use the legal procedures for claiming asylum, which existed in order to enter Spanish territory lawfully. Consequently, the Court decided that the lack of individual removal decisions could be attributed to the fact that the applicants had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct, and as a

55 Vladislava Stoyanova, 'The Grand Chamber Judgment in Ilias and Ahmed v. Hungary: Immigration Detention and How the Ground Beneath our Feet Continues to Erode', *Strasbourg Observer,* 23 December 2019, at https://strasbourgobservers.com/2019/12/23/the-grand-chamber-judgment-in-ilias-and-ahmed-v-hungary-immigration-detention-and-how-the-ground-beneath-our-feet-continues-to-erode/; Ashley Terlouw, 'De dubbele fictie bij verblijf in de transitzone', *EHRC Updates,* at www.ehrc-updates.nl/commentaar/207238.

56 Dissenting opinion by Judge Bianku (joined by Judge Vučinić) to the Grand Chamber judgment of the case *Ilias and Ahmed*.

57 *See* Krisztián Kecsmár, 'A migrációs fejlemények megítélése a strasbourgi és luxemburgi bíróság előtt', *Mandiner,* 19 February 2018, at https://mandiner.hu/cikk/20180219_kecsmar_krisztian_a_migracios_fejlemenyek_megitelese_a_strasbourgi_es_luxemburgi_birosag_elott.

58 *Ilias and Ahmed Chamber judgment, see* para. 83. in this regard

59 *N. D. and N. T. v. Spain (GC),* Nos. 8675/15 and 8697/15, 13 February 2020.

60 *Ilias and Ahmed GC judgment,* para. 213.

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result the Court could not hold the respondent State responsible for the lack of a legal remedy in Melilla enabling them to challenge that removal.[61]

The approach of taking into account the applicants' own conduct is visibly similar to the finding of the Grand Chamber in the *Ilias and Ahmed* case highlighting that the applicants voluntarily entered the transit zone. Certain policy-makers, who have to fulfill contradictory demands, such as protecting the people most genuinely in need of protection while having to apply international and European asylum law even in the case of economic migrants, have been waiting for this shift for a long time.[62] Apart from a more realistic approach on what constitutes detention, a paradigm shift can be observed as regards the conduct and responsibility of the applicant. The question is, if the migrant deliberately abuses the asylum system, should they enjoy all the rights and guarantees deriving from international law or EU law, or should some consequences result instead from a misconduct of falsely claiming asylum in order to be able to enter the territory of the EU.

3.3. The Follow-Up of the Ilias and Ahmed Case Before the CJEU

As Homer's Iliad does not tell the whole story of the Trojan War, but only one episode of it, the wrath of Achilles and its devastating consequences, the namesake's case before the ECtHR does not cover the complete set of proceedings that Hungary is facing as a result of its unique solution of establishing a transit zone at the land border. The Hungarian policy choice also provided grounds for referring to this in the Article 7 TEU procedure against Hungary, suspending certain transfers of asylum-seekers to Hungary and forming a basis for initiating infringement procedures by the Commission as well as national court turning to the CJEU for a preliminary ruling in new cases.

Not only did the European Parliament refer to the Chamber judgment when calling on the Council of the EU to act against Hungary to prevent a systemic threat to the Union's founding values,[63] but right after the Chamber judgment in March 2017 the European Council on Refugees and Exiles (ECRE)[64] published a legal note entitled 'Asylum in Hungary: Damaged beyond repair?'[65] ECRE called on all States not to transfer applicants for and beneficiaries of international protection to Hungary and to assume responsibility themselves for the examination of these asylum claims. As a result, among others, Germany – after a *de facto* stop in April – formally halted Dublin transfers to Hungary because of the

61 For a critical assessment of the judgment, *see* Constantin Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT Before the ECHR', *Blog on EU Immigration and Asylum Law and Policy,* 28 February 2020, at http://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/.

62 "We strongly believe that these solutions should lead to reducing the influx of illegal migrants into the European Union, allowing us to regain control over the management of mixed migration flows.", Joint Statement of V4 Interior Ministers on the Establishment of the Migration Crisis Response Mechanism, Warsaw, 21 November 2016.

63 *See* at www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html.

64 ECRE is a pan-European network of 98 NGOs assisting refugees and asylum seekers in 38 European countries.

65 *See* at www.ecre.org/wp-content/uploads/2017/03/Legal-Note-1.pdf.

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systematic detention, push backs and the lack of integration perspectives in the country.[66] ECRE also provided an analysis of legislative changes and administrative practice in Hungary, including recent changes which entered into forced on 28 March 2017.[67] In ECRE's view, Hungary's current legal framework puts rights of asylum seekers and beneficiaries of international protection at risk due to the following circumstances: the lack of access to the asylum procedure; the application of the 'safe third country' concept to Dublin transferees as well as first time applicants; the expansion of its summary returns policy; inadequate reception conditions and automatic use of detention; and the increased risks of destitution. Scholars also talk about further curtailment of asylum seekers' rights having occurred since the Chamber judgment.[68]

The question of how to interpret the judgment of the Grand Chamber rendered in the *Ilias and Ahmed* case as regards the Hungarian asylum provisions amended since 2015 is also raised by courts, who are keen to see how the 'Ilias principles' are applied in the newest Hungarian legal context. Although the Commission initiated the *infringement procedure C-808/18* against Hungary regarding certain elements of its asylum law,[69] but the judgment in two preliminary ruling procedures, namely *Joined Cases C-924/19 PPU and C-925/19 PPU*[70] preceded the judgment in the infringement procedure and therefore will be orienting for the Court in its later decision, as well. While during the hearing in the *infringement procedure C-808/18* against Hungary the European Commission *expressis verbis* stated several times that in its opinion the Hungarian legislation applicable at the time of the situation of *Ilias and Ahmed* had been compatible with EU law, the national rules applicable after 2017 regarding the transit zones were contrary to that. In the two joined preliminary ruling procedures the Court came to the conclusions that the EU Reception Conditions Directive[71] and the EU Asylum Procedures Directive must be interpreted as meaning that the obligation imposed on a third-country national to remain permanently in a transit zone

66 *See* at www.ecre.org/germany-follows-unhcr-call-for-suspension-of-dublin-transfers-to-hungary/.

67 *See* at www.kormany.hu/en/news/purpose-of-legal-border-closure-is-to-close-loopholes. *See* Act XX of 2017 on amending certain laws relating to the tightening of procedures carried out at the territories of border control.

68 *See* Boldizsár Nagy, 'Hungary, In Front of Her Judges (Asylum-related cases of Hungary in European Courts)', *in* Paul Minderhoud *et al.* (eds.), *Caught in Between Borders: Citizens, Migrants and Humans*, Wolf Legal Publishers, 2019, p. 255.

69 Two other procedures initiated by the European Commission are also related to the Hungarian transit zone. In *infringement procedure C-821/19* the Commission, among others, declared that Hungary failed its obligations as it criminalized organizing activity carried out in order to enable asylum proceedings to be brought in respect of persons who do not meet the criteria established in national asylum law. The Commission also issued a reasoned opinion in October 2019 (IP/19/5994) as a next step in the infringement procedure against Hungary for non-provision of food in the transit zones for returnees, hence not respecting obligations under the Return Directive (2008/115/EC) and Article 4 of the EU Charter of Fundamental Rights.

70 Judgment of 14 May 2020, *Joined Cases C-924/19 PPU and C-925/19 PPU, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* ECLI:EU:C:2020:367.

71 Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection.

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whose perimeter is restricted and closed must be interpreted in such a way that it does not affect the right of a third-country national to stay in that zone, within which the movements of that national are restricted and supervised, and that the latter cannot legally leave voluntarily in any direction whatsoever, appears to be a deprivation of liberty, characteristic of a detention within the meaning of the said Directives.[72]

As it is clear that the Courts in Strasbourg and Luxembourg came to completely different conclusions as regards the legal nature of the Hungarian transit zone, especially related to the circumstances in the zone and the consideration of the possibility to leave to Serbia, the reasons for such a diverging jurisprudence from the two Courts deserves extensive analysis. While the observations of this study intend to stay within the realm of *Ilias and Ahmed*, it is worth noting that although the CJEU, based on the EU *acquis*, came to a different conclusion and found that the stay in the Hungarian transit zones amounts to detention, the case could still provide input for future reforms, because if EU acquis changes as a result of legislative reforms, the CJEU will have a different reference point for its adjudication.[73] This is exactly the point of policy reforms: adjusting the legal framework to the new realities.[74]

3.4. The Future of the Common European Asylum System

Following the 2015-16 migration and asylum crises, in parallel to the immediate response, structural changes were proposed to be put in place to better react to the challenges of the migration and asylum systems, including the proposals to reform the Common European Asylum System (CEAS).[75] The European Commission opened all the six legal acts of the CEAS for major amendments in

72 *Joined Cases C-924/19 PPU and C-925/19 PPU, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság,* answer of the Court to Question 4.

73 Nevertheless, as regards legislative reforms, the EU still needs to follow international obligations as well as rights set out in the EU Charter of Fundamental Rights.

74 It should also be mentioned that as a result of the CJEU judgment, it adopted new legal provisions with Government Decree 233/2020. (V. 26.) as a result of which the border procedure and the two transit zones are no longer used and the Hungarian asylum authorities also immediately appointed a new accommodation on the territory of Hungary for those staying in the transit zones after the ruling of the CJEU.

75 *See* Ágnes Töttős, 'How to Interpret the European Migration Crisis Response With the Help of Science', *in* Zoltán Hautzinger (ed.), *Dynamics and Social Impact of Migration*, Dialóg Campus, Budapest, 2019, pp. 69-81.

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2016,[76] including turning most of the directives to regulations, and suggested adding a new regulation on resettlement from third countries.[77] Nevertheless, the reform ideas of the Commission divided the Member States on so many points, including the issue of relocation of asylum-seekers within the EU, and crossed so many national red lines that the majority of the Member States wanted to make sure that that none of the proposals are adopted until they agree on the complete set of proposals (package approach). As a result, the final death sentence of achieving any results in the era of the Juncker Commission was announced in March 2019 as no qualified majority decision could be adopted within that legislative term because of the various concerns Member States had, both as regards either of the seven proposals and as regards the package as a whole.[78]

Ever since then, and to tell the truth even before, there have been several ideas on the table on how to create a crisis resilient CEAS, what should be the guiding principles and how much Member States should stick to the Commission proposals issued in 2016, or the result of the negotiations so far. The ECtHR Chamber decision was referred to many times during the reform negotiations by those completely opposing the Hungarian solution of creating a land border transit zone at the EU's external border with the presumption that it is legally not considered a Hungarian territory. Nevertheless, after the judgment rendered by the Grand Chamber, and after Commission President von der Leyen's wish to provide a fresh start for European asylum reforms,[79] it is time to examine whether such a *novum* could serve as an inspiration for CEAS reforms in order to bring tangible results and create an effective European asylum system that is

76 Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, Proposal for a Regulation on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final; Proposal for a Regulation on the establishment of EURODAC (recast), COM(2016) 272 final; Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), COM(2016) 465 final; Proposal for a Regulation of the European Parliament and Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, COM(2016) 466 final; Proposal for a Regulation of the European Parliament and the Council establishing a common procedure in the Union and repealing Directive 2013/32/EU, COM(2016) 467 final.

77 Proposal for a Regulation establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, COM(2016) 468 final.

78 *See* at www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-parliament-says-no-asylum-reforms-are-dead/.

79 Ursula von der Leyen, 'A Union that Strives for More. My Agenda for Europe', *Political Guidelines for the Next European Commission 2019-2024,* at https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

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capable of distinguishing between those in genuine need of international protection and economic migrants.

In view of the conclusions of the *Ilias and Ahmed v. Hungary* case, the following new reform directions could be considered by policy-makers. Both in the international and European legal context the creation of the Hungarian transit zone was a *novum* as it created a land border zone with the legal presumption of not being on Hungary's territory. The main idea behind this new legal framework was to prevent the abuse of the asylum procedure carried out in order to gain entry to EU territory only by claiming asylum, furthermore it was supposed to ease the return of non-genuine asylum applicants.[80] The Grand Chamber also acknowledged its difference from airport transit areas and the case proved that migrants can be confined at a border zone without amounting to legally or *de facto* detention. It is also worth noting that while the ECtHR acknowledged States' right to control the entry, residence and expulsion of aliens even if they wish to enter for the purpose of claiming asylum, it seems that the presently applicable provisions of CEAS operate with the main rule of right to stay on the territory of the responsible Member States until the final decision in the asylum procedure is made. This rule combined with the Schengen acquis aiming at not having internal border controls resulted in a massive tendency of secondary movements[81] for various purposes, such as asylum-shopping,[82] escaping the implementation of return decisions or simply finding better living conditions.

Yet, what if the reform would create a system in which Member States could practically enforce their rights while providing protection for those seriously in need of it? Is it really an unfounded demand, given the fact that only about 30% of asylum claims result in an EU-regulated protection decision,[83] while more than 60% of return decisions cannot be implemented?[84] The idea of pre-screening the eligibility for international protection is already the main idea behind resettling genuine refugees directly from third countries. Furthermore, decision-making on non-EU territory, namely in regional disembarkation platforms is a concept that European leaders already agreed to explore in the European Council conclusions

80 This second argument is also enforced by the Proposal of the Commission for the Recast Reception Conditions Directive that sets out specific rules for return border procedures. *See* Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), COM(2018) 634 final, Article 22. The partial general approach of the Council [Article 22(9)] even suggests allowing not only return, but instead refusal of entry procedures in such cases.

81 Martin Wagner *et al.*, 'Secondary Movements', *CEASEVAL Research on the Common European Asylum System*, Nr. 34, Chemnitz, August 2019.

82 Erika Colombo, *EU Secondary Movements of Asylum Seekers: A Matter of Effective Protection and Solidarity*, ISMU Foundation, July 2019.

83 In January 2020 the EU recognition rate was 27%, *see* at www.easo.europa.eu/latest-asylum-trends.

84 The return rate was 36% in 2018 and 37% in 2017. Communication from the Commission to the European Parliament, the European Council and the Council, Progress report on the implementation of the European Agenda on Migration, Brussels, 16 October 2019, COM(2019) 481 final, p. 15.

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on 28 June 2018.[85] Nevertheless, although a couple of meetings among Member States as well as with international partners took place, apart the preparation of a concept note on behalf of the Commission[86] and a factsheet,[87] the policy idea of external hotspots has still not been integrated into the reform of the CEAS.

While the creation of disembarkation platforms depends to a great extent on the cooperation of third countries, procedures at newly established zones at the external border, yet on non-EU territories is a concept Member States have been given an impetus to examine as a result of the decision of the Grand Chamber in *Ilias and Ahmed*. Nevertheless, the chance of agreeing on certain elements of the concept, such as the compulsory or voluntary nature, the length and extent of the procedure, as well as the nature of confinement will determine the future of this idea, as well as the efficiency of the future CEAS. Another tricky question is the legal assessment of sea borders, as even the ECtHR found confinement at a sea border similar to that of airport transit areas in *J. R. and others v. Greece*,[88] since the applicants could not leave in the direction of Turkey, the country from which they came, otherwise than by boarding a vessel.[89] Nevertheless, both in cases of land and sea borders, a close cooperation with neighboring third countries, which has also been in the spotlight of EU migration policy, could bring tangible results.

It is also obvious that procedures at the border should be carried out as fast as possible in order to implement confinement only for the shortest period necessary. While this might tempt Member States to apply the safe third country concept in most of the cases, the Grand Chamber judgment in *Ilias and Ahmed* also showed that a Member State cannot omit carrying out a thorough and individualized assessment as regards the merits of the asylum claim or if no in merit assessment is made, as regards the asylum system of the third country considered safe for the applicant. The recognition of this obligation raises the question, whether in case of a manifestly unfounded application would not it be better to quickly decide in merit at the border, which is already allowed by EU asylum *acquis via* applying accelerated procedures in certain cases. The reform in this regard could lie in substantially extending the types of cases that should be decided in an accelerated way, and even making the use of such accelerated procedures compulsory for Member States.

Ilias and Ahmed, and even more so *N. D. and N. T.* raised the issue of not providing all the rights for migrants circumventing the applicable rules and abusing the legal system by not using the designated points to submit their asylum claims, but instead crossing EU external borders illegally in order to reach their chosen country of destination. This is definitely not a new idea, and especially in times of increased waves of migrants, EU Member States face the question of how to handle effectively mixed waves of migrants when genuine

85 European Council conclusions, 28 June 2018, para. 5.

86 *See* at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_non-paper-regional-disembarkation-arrangements_en.pdf.

87 *See* at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180724_factsheet-regional-disembarkation-arrangements_en.pdf.

88 *J. R. and others v. Greece*, No. 22696/16, 25 January 2018.

89 Id. para. 240.

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asylum-seekers are mixed with economic migrants, or even those eligible for international protection have their concrete destination country instead of requesting asylum in the first safe country. Such anomalies could even result in not activating already existing tools, such as the Temporary Protection Directive[90] in case of the Arab spring in 2011 or the Syrian crisis.[91]

Consequently, it should be further emphasized that apart from rights, asylum-seekers have obligations as well (such as the obligation to cooperate, being available to the authorities, *etc.*). Nevertheless, *N. D. and N. T. v. Spain* raises the question what consequences, even procedural ones, are legitimate in such cases that could be applied by more and more States in order to deter migrants from future abuses. Apart from procedural consequences, migrants abusing the system by illegally migrating onward within the EU could also be sanctioned by only receiving a part of reception conditions in line with the Reception Conditions Directive by the Member State responsible for their asylum application.

Finally, there is one more anomaly *Ilias and Ahmed* pointed at and it is the sensitive question of bearing an additional burden because of the deficiencies of other States, especially EU Member States. Certain voices,[92] especially after the decision of the CJEU in the so-called quota case,[93] accuse V4 countries of not agreeing to compulsory relocation of asylum-seekers considered to be a major, if not the only instrument of solidarity. In this regard it should be highlighted that the ECtHR criticized Hungary expelling migrants to Serbia not necessarily because of the Serbian asylum system, but because of a possible chain-*refoulement* to Greece,[94] not accepting it to be a sufficient argument that Hungary should not bear an additional burden to compensate for other states' deficient asylum system.[95] It also means that as long as there are such deficiencies in certain Member States as the ones existing in Greece according to the ECtHR, we cannot talk about a fair share of burden, since other Member States need to bear extra costs because of the deficiencies of others.

90 Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

91 *See Study on the Temporary Protection Directive Final Report*, Directorate-General for Migration and Home Affairs, January 2016.

92 *See e.g.* Maciej Duszczyk *et al.*, *From Mandatory to Voluntary. Impact of V4 on the EU Relocation Scheme*, European Politics and Society, 2019, pp. 1-18; Shoshana Fine, *All at Sea: Europe's Crisis of Solidarity on Migration*, ECFR Policy Brief, 14 October 2019.

93 Judgment of 2 April 2020, *Joined Cases C-715/17, C-718/17 and C-719/17 Commission v. Poland, Hungary and the Czech Republic*, ECLI:EU:C:2020:257.

94 The situation of asylum seekers in Greece amounting to torture or other-forms of ill treatment in breach of Article 3 of ECHR and Article 4 of the EU Charter of Fundamental rights has already been established in *M. S. S. v. Belgium and Greece (GC),* No. 30696/09 and Judgment of 21 December 2011, *Joined Cases C-411/10 and C-493/10, N. S. and others,* ECLI:EU:C:2011:865.

95 *Ilias and Ahmed GC judgment,* para. 162.

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As European Commission Vice-President Schinas[96] and Commissioner Johansson[97] were mandated to prepare a New Pact on Migration and Asylum to be launched in 2020, it will be interesting to see to what extent the reform ideas laid down in *Ilias and Ahmed* shall appear in the new rules envisioned by the Commission.

96 *See* at https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-margaritis-schinas-2019_en.pdf.

97 *See* at https://ec.europa.eu/commission/sites/beta-political/files/mission-letter-ylva-johansson_en.pdf.